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Special:

Circular Letter

TO: STATE AGENCIES, AGRICULTURAL DISTRICTS, PUBLIC AGENCIES, PERSONNEL AND HEALTH BENEFIT OFFICERS, EXECUTIVE ASSISTANTS AND DIVISION SECRETARIES, STATE COLLEGES AND UNIVERSITIES, COUNTY SUPERINTENDENT OF SCHOOLS, MANAGEMENT SUPERVISORY AND CONFIDENTIAL, INDIVIDUAL SCHOOL DISTRICTS, CalPERS FORMS LIAISONS, AND EMPLOYEE REPRESENTATIVES

SUBJECT: DISABILITY RETIREMENT REVISIONS:
STEVEN W. NOLAN v. CITY OF ANAHEIM

BACKGROUND

Under longstanding practice relying on statute and judicial interpretation, a California Public Employees Retirement System (CalPERS) member has been eligible for disability retirement if the worker can show substantial incapacity to perform the usual duties required of his or her current position.

On September 1, 2004, the California Supreme Court concluded in the case of *Steven W. Nolan v. City of Anaheim* (Nolan Decision), that a disability retirement applicant must be substantially incapacitated from performing the usual duties of the position for his/her current employer *and* from performing the usual duties of the position for other California public agencies in CalPERS (including public agencies, State agencies, and schools) to qualify for a disability retirement. If it is determined that a member, who is incapacitated from his/her current position, can still perform the usual duties of his/her position for other California public agencies in CalPERS *and* that similar positions with reasonably comparable pay, benefits, and promotional opportunities are available to the member, the member would not qualify for disability retirement.

IMPLEMENTATION OF THE COURT DECISION

CalPERS has undertaken modifications to the disability retirement determination process consistent with the Court's decision. Consequently, new disability/industrial

disability retirement applications along with those that are pending decision or under appeal, will be determined in accordance with the new criteria.

CalPERS now requires each employer to provide more specific information regarding a member's job duties, pay range, promotional opportunities, and benefits. A number of disability retirement forms and letters have been modified to elicit the appropriate information required by the Court's decision. The above forms are attached and will be available on the CalPERS Web site by December 15, 2004. It is anticipated that additional time will be required to process disability retirement applications. Employers are asked to submit any requested documents as expeditiously as possible.

As a resource to you and your employees, attached is a list of "Frequently Asked Questions" (FAQ's) that we are providing on the Nolan Decision to assist as questions arise.

Public agencies making local safety determinations should apply their own interpretation of the Nolan Decision to their existing procedures. The CalPERS FAQ's and forms attached are intended only as a guide.

Disability retirement workshops for employers are anticipated to resume in spring 2005. If you have any questions, please call the Employer Contact Center at (888) CalPERS (225-7377).

A handwritten signature in cursive script, reading "Lori McGartland".

Lori McGartland, Acting Chief
Actuarial and Employer Services Division

Attachments (4)

DISABILITY RETIREMENT CHANGES DUE TO THE NOLAN DECISION

FREQUENTLY ASKED QUESTIONS

The following questions and answers apply only to disability determinations made by CalPERS. Public agencies making local safety determinations should apply their own interpretation of the Nolan Decision to their existing procedures. CalPERS' procedures and forms referenced below are intended only as a guide.

1. What is the Nolan case about and why does it affect all disability cases?

As a result of the Nolan case (*Nolan vs. the City of Anaheim*), the State Supreme Court concluded that to qualify for a disability retirement a member must show substantial incapacity to perform the usual duties of their current position and also show a substantial incapacity to perform the usual duties of the position for other California public agencies in CalPERS¹. A member who is incapacitated from their current position but is able to perform the usual duties of their position for other California public agencies in CalPERS¹ will be denied disability retirement if there is a similar position available.

2. When was the Nolan decision effective?

September 1, 2004.

3. Will the Nolan case affect applications that were filed before the Supreme Court's decision?

Yes. All new and pending disability and industrial disability retirement applications awaiting a decision, and those under appeal, will be determined under the new criteria. By January 1, 2005, all members with pending applications will receive a letter explaining the new criteria. In addition, the letter will include the new required forms and FAQs.

4. How much longer will it take to process an application and reach a decision?

As a result of the Nolan Decision additional information will be required from both the member and employer. Consequently, additional time will be required to reach a decision. The time it takes to reach a decision will depend on the facts and circumstances of each case and how long it takes CalPERS to receive the additional requested information. Preliminary estimates indicate that an additional 3 – 5 months will be added to the current processing time.

¹ California public agencies in CalPERS include state, school and public employers.

5. What will members be expected to do differently under the Nolan Decision?

Members are expected to make every effort to obtain the additional information requested by CalPERS and seek their employer's and doctor's cooperation in providing all necessary information.

The following forms are required of the Member:

- Employer Information for Disability Retirement
This form replaces the previous form (Request for Employee Information, PERS-BSD-64). This is a request for the employer to provide personnel information pertinent to the disability retirement application. A job description/duty statement is required, or should be produced if one does not presently exist, that includes a detailed description of the employee's actual duties and the percentage of time spent performing each duty.
- Physical Requirements of Position/Occupational Title
This form should be completed jointly by both the member and employer. The member should attach a copy of this form to the Physician's Report on Disability prior to presenting to their physician.
- Physician's Report on Disability
This form replaces the previous form (Medical Report, PERS-BSD-1372). The member must provide this new medical report form to their physician for CalPERS to receive their doctor's opinion regarding the new criteria, regardless of whether or not other medical reports have been previously submitted. A copy of the member's job description and a copy of the Physical Requirements of the Position/Occupational Title must be attached when presenting the Physician's Report on Disability to the physician.

Note: The above forms will be available on the CalPERS' Web site by December 15, 2004, as well as provided directly to those members with pending applications.

6. Will employers be required to provide additional information beyond what they are currently providing?

Yes. Employers will be asked to provide more detailed information regarding a member's job duties and the physical requirements of the position. Employers also may be contacted by a job assessor to provide information regarding a member's pay, benefits, and promotional opportunities.

The following forms are required of the Employer:

- Physical Requirements of Position/Occupational Title
This form will be provided by the member and should be completed jointly by the member and employer. A copy of the completed form should be provided to the member and the original sent to CalPERS.
- Employer Information for Disability Retirement
This form replaces the previous form (Request for Employee Information, PERS-BSD-64). This is a request for the employer to provide personnel information pertinent to the disability retirement application. A job description/duty statement is required, or should be produced if one does not presently exist, that includes a detailed description of the employee's actual duties and the percentage of time spent performing each duty.

7. What if a job description/duty statement for the member's position does not exist?

As permitted by your agency's personnel rules and collective bargaining agreements, the member and employer (personnel officer & immediate supervisor) should draft a description of the duties performed by the member and the percentage of time spent performing each duty.

8. How will doctors be informed of the new requirements?

The medical report form, Physician's Report on Disability, and CalPERS' correspondence to doctors have been revised to obtain the additional information required by the Nolan decision.

9. Who would be responsible for determining if a member can perform the usual duties of the position for other California public agencies¹ in CalPERS?

CalPERS will determine if the member is capable of performing their usual duties for other California public agencies in CalPERS¹.

10. What is a similar position?

A similar position would be one with the same duties as the member's current position which provides reasonably comparable pay, benefits, and promotional opportunities.

¹ California public agencies in CalPERS include state, school and public employers.

11. Would the employer have to find the member a similar position?

No. Under the Nolan decision CalPERS is only required to determine if a similar position is available.

12. Who would determine if there is a similar position available?

CalPERS will utilize independent vocational experts to conduct job assessments to determine if there is a similar position available to the member.

13. What does an available position mean?

An available position would be a similar position that exists with a California public agency¹ in CalPERS. The position does not have to be offered to the member or be vacant.

14. Will the Nolan decision affect a member's eligibility for a disability retirement?

It may. Members may not qualify if they are substantially incapacitated for their current position but their disability is such that they could perform the same duties with other California public agencies in CalPERS¹.

15. If a member is disabled and cannot perform their job, how could he/she perform their job somewhere else?

Under certain circumstances it is possible that a member who cannot perform the usual duties of their current position may be able to perform the usual duties of the position for other California public agencies in CalPERS¹, and therefore would not be considered substantially incapacitated.

16. Will this have any effect on the Workers' Compensation system or requirements?

No. The Workers' Compensation system and requirements are separate from CalPERS and are governed by a different set of laws and regulations.

¹ California public agencies in CalPERS include state, school and public employers.



Physical Requirements of Position/Occupational Title

Instructions

This form must be completed by the member and their employer to supplement, if any, the physical requirements listed on the member's duty statement/job description. The employer must give the member a copy of this form once it has been completed and signed by both parties, then sends the original to CalPERS. The member must then attach their current duty statement/job description and the copy of the Physical Requirements of Position/Occupational Title to the Physician's Report on Disability prior to sending to their physician.

Member SSN	/	Member Name	/	Position/Occupational Title
Employer Name		Worksite Street Address		City
				State
				Zip

Indicate with a check mark (✓) the frequency required for each activity listed below.

Activity	Never	Occasionally Up to 3 hours	Frequently 3 – 6 hours	Constantly Over 6 hours	Distance/Height
Sitting					
Standing					
Walking					
Crawling					
Kneeling					
Climbing					
Squatting					
Bending (neck)					
Bending (waist)					
Twisting (neck)					
Twisting (waist)					
Reaching (above shoulder)					
Reaching (below shoulder)					
Pushing & Pulling					
Fine Manipulation					
Power Grasping					
Simple Grasping					
Repetitive use of hand(s)					
Keyboard Use					
Mouse Use					
Lifting/Carrying					
0 – 10 lbs.	/	/	/	/	/
11 – 25 lbs.	/	/	/	/	/
26 – 50 lbs.	/	/	/	/	/
51 – 75 lbs.	/	/	/	/	/
76 – 100 lbs.	/	/	/	/	/
100 + lbs.	/	/	/	/	/

Member SSN

Member Name

Position/Occupational Title

Indicate with a check mark (✓) the frequency required for each activity listed below.

Activity	Never	Occasionally Up to 3 hours	Frequently 3 – 6 hours	Constantly Over 6 hours	Distance/Height
Walking on uneven ground					
Driving					
Working with heavy equipment					
Exposure to excessive noise					
Exposure to extreme temperature, humidity, wetness					
Exposure to dust, gas, fumes, or chemicals					
Working at heights					
Operation of foot controls or repetitive movement					
Use of special visual or auditory protective equipment					
Working with bio-hazards (e.g., blood-borne pathogens, sewage, hospital waste, etc.)					

Comments or additional requirements not listed above:

Signature of Employer Representative/Title

Date

()

Phone Number

Signature of Member

Date

()

Phone Number

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Physician's Report on Disability

Notice To Physician

This form must be completed by a medical doctor. The following information is needed for use in connection with the patient's application for disability retirement allowance under the California Public Employees' Retirement Law. Please provide your full reply, in order to completely describe the nature and severity of impairment. Also, include copies of your medical reports.

_____/_____/_____
Member SSN Member Name Date of Birth Position/Occupational Title

For Kaiser Patients, Medical Record Number: _____

Part 1 History

Date of First Visit: _____ Date of Last Visit: _____

Date Present Illness/Injury Occurred: _____ Date Applicant Unable to Work: _____

Origin of Injury: ☐ Work Related ☐ Non Work Related

Describe How Injury Occurred: _____

Part 2 Present Condition

Height: _____ Weight: _____ Blood pressure: _____

Subjective Symptoms: _____

Part 3 Diagnosis / Objective Findings

Diagnosis: _____

Objective Findings: **Cardiac:** _____

Orthopedic: _____

Psychological: _____

Pulmonary: _____

Visual: _____

Neurological: _____

Other: _____

☐ Atrophy ☐ Hemiplegia ☐ Tremors ☐ Paralysis ☐ Gait
☐ Impaired Speech ☐ Mental Disturbances

Provide dates and findings of any X-rays, EKGs, laboratory or diagnostic testing performed. Use additional sheets if necessary.

Part 4 Medical Qualifications and Statement of Incapacity (ALL QUESTIONS MUST BE ANSWERED.)

To qualify for a disability retirement, the CalPERS member must be substantially incapacitated for the performance of the usual duties of his/her position with the current employer. In addition, the member must also be substantially incapacitated from performing the usual duties of the position for other California public agencies in CalPERS. (California public agencies in CalPERS includes state, school and public employers.) This "substantial incapacity" must be due to a medical condition of permanent or extended and uncertain duration. Disability is not necessarily an inability to perform fully every function of a given position. Rather, the courts have concluded that the test is whether the member has a substantial inability to perform the usual and customary duties of the position. **Prophylactic restrictions are not a basis for a disability retirement.** You must review the attached duty statement and physical requirements of the member's position prior to answering the following questions:

1. Is the member presently, substantially incapacitated from performance of the usual duties of the position for their current employer? ☐ Yes ☐ No
 - a. If yes, describe specific work activities that the member is unable to perform due to incapacity. _____

2. Is the member presently, substantially incapacitated from the performance of the usual duties of the position for other California public agencies in CalPERS? ☐ Yes ☐ No (California public agencies in CalPERS includes state, school and public employers.)
Please explain. _____

3. Will Incapacity Be Permanent? ☐ Yes ☐ No
 - a. If not, Probable Duration: ☐ < 6 months ☐ 6 months – 1 year ☐ 1 – 2 years ☐ Other _____
4. What information did you review to make your medical opinion? *Check all that apply.*
☐ Job Description/Duty Statement ☐ Physical Requirements ☐ Information provided by member
☐ Other _____

Attach all information reviewed, to this report.

Part 5 Mental Status

Is member mentally able to handle financial affairs & enter into legally binding contracts? ☐ Yes ☐ No

If no, date of onset: _____

Is member competent to endorse checks with the realization of nature & consequence of the act? ☐ Yes ☐ No

If no, date of onset: _____

Part 6 Signature

Mail completed report directly to CalPERS. **Do not give to applicant.**

CalPERS has my permission to release a photocopy of report to applicant, upon written request. ☐ Yes ☐ No

Printed Name of Physician

Telephone Number

Fax Number

Address

City

State

Zip

Signature of Physician/Title

Date



Employer Information for Disability Retirement

MEMBER

Complete this form, sign, date and forward to your Employer.

EMPLOYER

Use this form as a coversheet for the employee's job description and other documents you submit to CalPERS.

_____/_____/_____
Member SSN Member Name Position/Occupational Title

Employer/Agency Name

I have submitted an application for disability retirement with the California Public Employees' Retirement System (CalPERS). I am submitting this letter to you (my employer) on behalf of CalPERS. CalPERS is seeking information to substantiate my disability.

As soon as possible, please send CalPERS the duty statement/job description for the position I held. Please include a copy of all accident reports, medical reports, and personnel actions filed within the past five years. These documents must be identified with my name and Social Security number. If you have additional comments, please submit them.

CalPERS requires the physical requirements of my position/occupational title. I will be contacting you so we can complete the Physical Requirements of Position/Occupational Title form for my position. At that time, a copy of my duty statement/job description that you sent to CalPERS must be provided to me. Both the duty statement/job description and the Physical Requirements of Position/Occupational Title form will be presented to my physician to assist in the evaluation of my disability retirement.

When the CalPERS determination of disability is completed, they will inform you. When you are notified of their determination, you will have the right to appeal the approval/denial of the application for disability retirement for the medical condition stated, in accordance with Section 555.3, Title II, California Code of Regulations by filing a written request with CalPERS within 30 days of the mailing of the determination letter. An appeal, if filed, should set forth the factual basis and legal authorities for such appeal.

Under the law, if a person (other than my employer) caused an injury that results in certain CalPERS benefits being paid, CalPERS has the right to recover up to one-half of the total retirement benefit costs payable from the responsible party. This right is known as a "right of subrogation" (Government Code Section 20250, et seq.).

Please advise CalPERS if you are aware of any claim (other than a Workers' Compensation claim) against any person or entity for the same injuries that also entitle me to a disability retirement from CalPERS.

Authorization to Release Information

The purpose of this authorization is to assist CalPERS in determining my right to retirement or reinstatement under the Retirement Law, pursuant to Government Code Section 20128, and for no other purpose. This authorization will be valid for four years from the date shown below. A photographic copy of this authorization shall be as valid as the original.

Member Signature

Date

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